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September 22, 2006

Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Matter Under Review 5799

Dear Mr. Jordan:

This firm represents Senator John McCain in FEC Matter Under Review 5799. The signed designation of counsel is attached hereto.

For the reasons outlined below, we respectfully request that the Commission find no reason to believe a violation has occurred and dismiss the complaint.

THE FACTS

Senator McCain agreed to appear at a reception for Adjutant General Stan Spears, a state candidate in South Carolina, pursuant to a request he received from General Spears. As detailed in the attached affidavit of Craig Goldman, executive director of Senator McCain's Straight Talk America PAC, Senator McCain and his agents had no role in planning the event or designing the format of the invitation. Mr. Goldman did, however, request that he be shown an advance copy of the invitation and reply card to ensure that it included the disclaimers required by the FEC for invitations to state candidate events mentioning federal officeholders. The package as approved by Mr. Goldman, after conferring with legal counsel, contained a disclaimer from the Spears Committee which included the following statements:

The solicitation of funds is being made only by Spears for Adjutant General. We are honored to have Senator McCain as our Special Guest for this event. In accordance with federal law, Senator McCain is not soliciting individual contributions in excess of \$2,100 per person, nor is he soliciting corporate, labor union, or foreign national contributions.

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The disclaimer also provided information about the non-tax deductibility of political contributions, and information about South Carolina limits and restrictions was included in the disclaimer and elsewhere in the invitation.

This disclaimer complies with FEC Regulations and follows the advice of relevant FEC Advisory Opinions (discussed in detail below). In particular, it meets the express statement of Advisory Opinion 2003-03 (discussed in detail below) that such invitations are permissible "so long as the solicitations [by the state candidate] included or were accompanied by a message adequately indicating that the covered individual is only asking for federally permissible funds."

THE LAW, REGULATIONS AND ADVISORY OPINIONS

The Bipartisan Campaign Reform Act ("BCRA") provides that federal candidates and officeholders shall not solicit or direct funds in connection with any election unless the funds comply with the Act's contribution limits and prohibitions. 2 USC 441i (e) (1) (A) and (B). The Commission issued rules interpreting "solicit" and "direct" in 2002. 11 CFR 300.2 (m) and (n). After those regulations were invalidated in Shays v. FEC, the Commission issued new regulations, published in the Federal Register on March 20, 2006, redefining solicit and direct. 71 Fed. Reg. 13926 et seq. Between the date of the first regulations in 2002, and that of the second in 2006, the Commission issued several Advisory Opinions that explicitly addressed the question of whether a federal candidate or officeholder may appear at a fundraising event for a candidate for state office or for a state party committee, and what notices or statements must be made in connection with such appearance. See FEC Advisory Opinions 2003-03, 2003-05, and 2003-36. As the Commission has summarized these Advisory Opinions, they "permitted Federal candidate or officeholders to attend and participate in a fundraising event for non-Federal funds held by State and local candidates, or by non-Federal political organizations, so long as the solicitations made by the Federal candidate included, or were accompanied by, certain disclaimers." 71 Fed. Reg. at 13930. In the Notice of Proposed Rulemaking for the 2006 rules, and then in the Explanation and Justification of those rules, the Commission stated that it was not necessary to revisit those Advisory Opinions. They accordingly may be relied upon by persons in the same position as the requestors. 2 USC 437f(c)(2).

The first of these Advisory Opinions was AO 2003-03, issued to Congressman Eric Cantor and various Virginia elected officials, who sought advice concerning Congressman Cantor's involvement in fundraising for candidates for state office in Virginia. The Commission analysis begins by noting the restrictions of 2 USC 441i(e), and then stating:

"The Commission notes, however, that section 441i(e) does not forbid a covered person from making any solicitation of funds in connection with a non-Federal election. The Commission understands section 441i (e) to provide that a covered

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person may make solicitations, but may not solicit funds that are outside the amount limitations and source prohibitions of the Act."

Addressing the question whether a federal candidate or officeholder may attend a fundraising event for a state candidate or party, at which non-federal funds are to be raised, the Advisory Opinion is clear:

"Yes, mere attendance at a fundraiser where non-Federal funds are raised cannot in and of itself give rise to a violation of section 441i (e) (4) or section 300.62. A covered person may participate in any activities at such a fundraising event provided the covered person does not solicit funds outside the Act's limitations and prohibitions." Question 3A

The next issue is whether the federal candidate or officeholder may participate in the event as a "featured guest" or speaker. Here, the Commission concludes that he may, but that such participation may in certain circumstances constitute a solicitation which must be limited as to amount and source:

"Yes, Representative Cantor may speak at such an event, provided that by his own speech and conduct he complies with section 441i (e) (1) (B) and section 300.62 in the course of his participation in a fundraiser." Answer 3 D

"Section 441i(e)(1) and section 300.62 do not apply to publicity for an event where that publicity does not constitute a solicitation or direction of non-Federal funds by a covered person, nor to a Federal candidate or officeholder merely because he or she is a featured guest at a non-Federal fundraiser. In the case of publicity, the analysis is two-fold: First, whether the publicity for the event constitutes a solicitation for donations in amounts exceeding the Act's limitations or from sources prohibited from contributing under the Act; and, second, whether the covered person approved, authorized, or agreed or consented to be featured or named in, the publicity. If the covered person has approved, authorized, or agreed or consented to the use of his or her name or likeness in publicity, and that publicity contains a solicitation for donations, there must be an express statement in that publicity to limit the solicitation to funds that comply with the amount limitations and source prohibitions of the Act. 2 U.S.C. 441i (e) (1) (B); 11 CFR 300.62." Answer 3 C (emphasis added)

Thus, if a candidate or officeholder approves an invitation to a state candidate event that itself solicits non-federal funds, he or she must make it clear that any funds he or she is soliciting are only those permitted under federal law.

Subsequent to Advisory opinion 2003-03, the Commission further elaborated on some of these same issues in Advisory opinion 2003-36, issued to the Republican Governor's Association. The Commission summarized its advice as follows:

In Advisory Opinion 2003-03, the Commission addressed appearances, speeches, and solicitations by a Federal candidate or officeholder at fundraising events for non-Federal candidates where federally impermissible funds were being raised. The Commission interpreted the Act and regulations to permit oral solicitations, and signatures on written solicitations, by a covered individual, so long as the solicitations included or were accompanied by a message adequately indicating that the covered individual is only asking for Federally permissible funds. See 2 U.S.C. 441i (e) (1) (B); 11 CFR 300.62. The following is considered to be an adequate disclaimer: I am asking for a donation of up to \$5,000 per year. I am not asking for funds from corporations, labor organizations, or other Federally prohibited sources.

The Commission restated its position, in the converse, as follows:

2. With respect to the RGA Conference Account, may a covered individual sign or appear on written solicitations, such as signing invitation letters, or appear as a featured guest or speaker at a fundraising event, where the donations solicited exceed the Act's amount limits or are from prohibited sources but the solicitation does NOT include a notice that the covered individual is not raising funds outside the amount limits and source prohibitions of the Act? [emphasis added]

No, the covered individual may not so participate under those circumstances. The requirements described above in response to questions 1a, 1b, and 1c are applicable to the situations described in question 2, including the need for the notice that the covered individual is asking for funds only up to the applicable limits of the Act, and is not asking for funds outside the limitations or prohibitions of the Act.

Answer 2

ANALYSIS

As reviewed above, regulations, and applicable Advisory Opinions, make it clear that

- a federal candidate or officeholder may be a featured guest and speaker at an event for a state candidate or party
- the event may raise non-federal funds (those in excess of federal limits or from sources not permitted in federal elections)
- the federal candidate, however, may not solicit funds in excess of those permitted by federal law, or from sources prohibited by federal law
- to the extent that publicity for the state candidate event solicits funds, the communication must include "a message adequately indicating that the covered individual is only asking for Federally permissible funds." [Advisory opinion 2003-36]

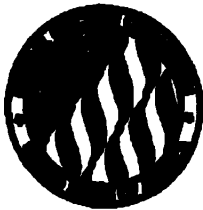
The solicitation at issue in this complaint met the standards established by the Commission and described herein. Senator McCain was identified as a "Special Guest" in the invitation. The invitation paid for by the state candidate contained a solicitation for non-federal funds, and also contained the specific statement that Senator McCain was not making the solicitation for those funds ("The solicitation of funds is being made only by Spears for Adjutant General"). Arguably, the flat disclaimer that Senator McCain was not making the solicitation for funds should have been sufficient by itself. However, in order to ensure full compliance with AO 2003-3, the invitation went on to add the additional statement that "Senator McCain is not soliciting individual funds in excess of \$2,100 per person, nor is he soliciting corporate, labor union, or foreign national funds."

CONCLUSION

For the above reasons, the Federal Election Commission should find that the mention of Senator McCain in the fundraising invitation paid for and mailed by the Spears for Adjutant General campaign, and the accompanied disclaimer, was in compliance with Federal law, and accordingly should dismiss the complaint as being without merit.

Respectfully,


Trevor Potter
Counsel



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Office of General Counsel
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Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL
Please use one form for each Respondent/Witness
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MUR: _____

COUNSEL: Trevor Potter

FIRM: Caplin and Drysdale

ADDRESS: One Thomas Circle, NW, Suite 1100, Washington, DC 20005

TELEPHONE - OFFICE: (202) 862-5092

FAX: (202) 429-3301

The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

9/12/06
Date

John McCain
Signature

United States Senator
Title

RESPONDENT/WITNESS NAME (PRINT): John S. McCain

MAILING ADDRESS: United States Senate

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Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.